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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

Date: APR 17 2012 Office: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant petition for Alien Worker as a Professional Holding an Advanced Degree or an Alien of Exceptional Ability pursuant to section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a provider of information technology consulting services. It seeks to employ the beneficiary permanently in the United States as a system analyst, pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The labor certification was approved by the DOL on behalf of another alien, who was also the beneficiary of a Form I-140, Immigrant Petition for Alien Worker, (SRC-06-247-52846), that was filed on his behalf by the petitioner and approved by United States Citizenship and Immigration Services (USCIS) on September 1, 2006. The director determined that the labor certification could not be used again to support the subsequently filed Form I-140 petition of the current beneficiary in the instant case and denied the petition accordingly.

On appeal, counsel asserts that he previously requested the withdrawal of the approved Form I-140 petition submitted by the petitioner on behalf of the original beneficiary because this individual was no longer working for the petitioner. Counsel notes that his first request to withdraw the approved Form I-140 petition was contained in a letter dated March 7, 2007, and that his second request was in a separate letter dated July 6, 2007, that accompanied the Form I-140 petition filed on behalf of the current beneficiary in the instant case. Counsel contends that USCIS erroneously allowed the original beneficiary to subsequently adjust to permanent residence, despite his requests to withdraw the approved Form I-140 petition. Counsel states that USCIS should finally process the withdrawal of the approved Form I-140 petition, recognize the validity of the labor certification, and allow the current beneficiary to be substituted for the original beneficiary on the labor certification. Counsel submits copies of the letters dated March 7, 2007 and July 6, 2007, a copy of the USCIS approval notice dated September 1, 2006, for the Form I-140 petition, [redacted], filed on the original beneficiary's behalf, and an affidavit from the petitioner's president in support of the appeal.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

The labor certification is evidence of an individual alien's admissibility under section 212(a)(5)(A)(i) of the Immigration and Nationality Act (Act), which provides:

> In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

> (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
>
> (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

The regulation at 20 C.F.R. § 656.11 states the following:

> Substitution or change to the identity of an alien beneficiary on any application for permanent labor certification, whether filed under this part or 20 CFR part 656 in effect prior to March 28, 2005, and on any resulting certification, is prohibited for any request to substitute submitted after July 16, 2007.

Additionally, the regulation at 20 C.F.R. § 656.30(c)(2) provides:

> A permanent labor certification involving a specific job offer is valid only for the particular job opportunity, the alien named on the original application (unless a substitution was approved prior to July 16, 2007), and the area of intended employment stated on the *Application for Alien Employment Certification* (Form ETA 750) or the *Application for Permanent Employment Certification* (Form ETA 9089).

The Act does not provide for the substitution of aliens in the permanent labor certification process. The DOL's regulation became effective July 16, 2007 and prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications, as well as prohibiting the sale, barter, or purchase of permanent labor certifications and applications. The rule continues the DOL's efforts to construct a deliberate, coordinated fraud reduction and prevention framework within the permanent labor certification program. *See* 72 Fed. Reg. 27904 (May 17, 2007).

Section 212(a)(5)(A)(iv) of the Act cannot be interpreted as allowing the adjustment of status of an alien based on a labor certification that formed the basis for another alien's admissibility when section 212(a)(5)(A)(i) of the Act explicitly requires a labor certification as evidence of an individual alien's admissibility. To construe section 212(a)(5)(A)(iv) of the Act in that manner would violate the "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." *Dept. of Revenue of Or. v. ACF Indus., Inc.,* 510 U.S. at 340 .

Significantly, USCIS may not approve a visa petition when the approved labor certification has already been used by another alien. *See Matter of Harry Bailen Builders, Inc.*, 19 I&N Dec. 412,

414 (Comm'r 1986).[2] When Congress enacted the job flexibility provision of section 204(j) of the Act, Congress made no correlative amendments to the admissibility requirements of section 212(a)(5)(C) of the Act that would allow a labor certification to be used as evidence of admissibility for two or more aliens.[3] The AAO must assume that Congress was aware of the agency's previous interpretation that a labor certification can only support the adjustment of one alien under the Act when AC21 was passed and did not specifically alter that interpretation. *See Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (Congress is presumed to be aware of administrative and judicial interpretations where it adopts a new law incorporating sections of a prior law). The labor certification on which the underlying petition is based has already served as the basis of admissibility for a different alien and is no longer "valid." Counsel provides no legal authority, and the AAO knows of none, that would allow USCIS to rely on the labor certification of an adjusted alien to adjust a second alien.

Beyond the decision of the director, the petition must also be denied because the minimum education requirements in the Form ETA 750 do not support a petition for an advanced degree professional under Section 203(b)(2) of the Act. Accordingly, the petition must be denied for this reason.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (AAO's *de novo* authority is well recognized by the federal courts).

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

Section 203(b)(2) of the Act also includes aliens "who because of their exceptional ability in the sciences, arts or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States." The regulation at 8 C.F.R. § 204.5(k)(2)

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[2] While *Harry Bailen,* 19 I&N Dec. at 414, relies in part on language in 8 C.F.R. § 204.4(f) that no longer exists in the regulations, the decision also relies on the DOL's regulations, which continue to hold that a labor certification is valid only for a specific job opportunity. 20 C.F.R. § 656.30(c)(2). Moreover, the reasoning in *Harry Bailen,* 19 I&N Dec. at 414 has been adopted in recent cases. *See Matter of Francisco Javier Villarreal-Zuniga,* 23 I&N Dec. 886, 889-90 (BIA 2006).

[3] Conceivably, a substituted alien could also "port" to a new employer under AC21, allowing the employer to once again legitimately substitute a new beneficiary, resulting in a theoretically unlimited number of aliens adjusting status pursuant to a single labor certification.

defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered."

Here, the Form I-140 petition filed on behalf of the current beneficiary in the instant case was filed on July 11, 2007. On Part 2.d. of the Form I-140, the petitioner indicated that it was filing the petition for a member of the professions holding an advanced degree or an alien of exceptional ability.

The regulation at 8 C.F.R. § 204.5(k)(4) states in pertinent part that "[t]he job offer portion of an individual labor certification, Schedule A application, or Pilot Program application must demonstrate that the job requires a professional holding an advanced degree or the equivalent of an alien of exceptional ability."

In this case, part 14 of the Form ETA 750A indicates that the minimum level of education required for the proffered position of system analyst position is "4+" years of college with a "Master or equivalent*" degree in computer science. Part 14 of the Form ETA 750A further indicates that 6 months experience in the offered job or 6 months experience in the alternate occupations of "Programmer or Analyst or IT Consultant or Software Engineer" is required. Part 15 of Form ETA 750 specifies that the petitioner "Will accept 3-yr college plus 2-yr PG diploma as MS equivalent or 3-yr college plus 1-yr PG diploma and 5-yr IT exp. as MS equivalent." Accordingly, the job offer portion of the Form ETA 750 does not require a professional holding an advanced degree or the equivalent or an alien of exceptional ability but instead permits the proffered position to be filled by aliens holding a combination of degrees and diplomas which may be less than a U.S. baccalaureate. However, the petitioner requested classification as a member of the professions holding an advanced degree or an alien of exceptional ability. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988).

The evidence submitted does not establish that the Form ETA 750 requires a professional holding an advanced degree or the equivalent of an alien of exceptional ability, and the appeal must be dismissed for this additional reason.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.